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Supreme Court of the United States

OCTOBER TERM, 1966

No. 254

THEODORE STOVALL,

Petitioner,

against

HON. WILFRED DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

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BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

Interest of the *Amicus*

The granting of certiorari in this case brings before the Court important questions involving the relationship of the State to a criminal accused, the scope of the constitutional guarantees of the Fifth, Sixth and Fourteenth Amendments, and the availability of federal habeas corpus as a forum for the establishment of a new exclusionary rule.

We agree with and endorse fully the positions taken by counsel for the respondent and for the State District Attorneys' Association as *amicus curiae*—positions which are consistent with established concepts of the privilege

against self-incrimination, the right to the assistance of counsel, and due process of law—in opposition to the arguments advanced here by the petitioner. Particularly in view of the fact that the Court now has before it two other cases involving similar facts and issues,[1] however, we recognize the possibility that the Court may consider the establishment of an exclusionary rule limiting the admissibility of identification evidence obtained in the absence of counsel. Accordingly, we have focused our attention in this brief upon the somewhat limited questions of whether any such exclusionary rule should be applied retroactively.

The interest of the Attorney General in this question—one which is posed clearly by the facts of this case as well as by other cases in which habeas corpus petitioners rely on recent decisions of this Court—is substantial. Because the present case involves a New York State prisoner, the Attorney General naturally has a strong interest in its outcome.[2] In addition, however, the Attorney General, as chief legal officer of the State and as counsel for State

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[1] *Gilbert* v. *California*, No. 223; *United States* v. *Wade*, No. 334. Although in some respects similar, the circumstances surrounding the identifications and the subsequent use of the identification testimony in *Gilbert* and *Wade* are by no means identical to those in the present case. In addition, in *Gilbert* there are several issues wholly unrelated to the use of the identification testimony. *Wade* involves a federal prosecution; thus constitutional issues need not be reached in that case. Both *Gilbert* and *Wade*—unlike the present case—reach the Court while in the direct appellate process.

[2] The Attorney General normally appears as counsel for respondent in federal habeas corpus proceedings involving State prisoners (e.g., *Angelet* v. *Fay*, 381 U. S. 643). Pursuant to long-standing practice in cases where the death sentence has been imposed, however, the District Attorney in the county of conviction (Nassau County) has represented the Warden throughout the federal proceedings in the instant case. It should be noted, however, that pursuant to a proclamation made by the Governor at the time he approved a bill abolishing capital punishment in all cases except those involving the killing of a peace officer acting in the line of duty or involving murder by a person already under a sentence of life imprisonment (L. 1965, ch. 320), petitioner's death sentence will be commuted regardless of the outcome of these proceedings.

correction officials, is concerned over the possible effects of an adverse decision upon the convictions of other State prisoners. The problem of retroactive application of new constitutional rules is an acute one, particularly in the present era of rapidly changing concepts of due process in the criminal law field.

The New York Attorney General has appeared either as counsel for a party or as *amicus* in the recent cases dealing with the applicability to earlier convictions of the newly developed exclusionary rules barring admission of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618; *Angelet* v. *Fay*, 381 U. S. 643) and governing the admissibility of in-custody statements of an accused (*Johnson* v. *New Jersey*, 384 U. S. 718). Consistent with our position in those cases, we urge in this brief that, whatever may be the Court's views regarding the admissibility of eyewitness identification testimony or testimony as to post-arraignment or post-indictment identifications (or other investigations involving contact between the police and an accused) in the absence of counsel, any newly established rule excluding such testimony should not be applied retroactively.

Summary of Argument

The petitioner in the present case concentrates exclusively on the pre-trial hospital identification made after arraignment and in the absence of counsel. In doing so, he wholly ignores the fairness of his 1962 trial and the reliability of the adjudication of his guilt. There can be no doubt, however, but that the use at trial of the identification testimony violated no previously declared constitutional rights. Because the case arises on habeas corpus and involves a conviction which became final prior to the establishment of any of the recent decisions involving the right to counsel at extra-judicial proceedings, a retroactivity issue is necessarily present.

We submit that the same considerations which militated against retroactive application of newly established rules limiting the admissibility of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618), prohibiting adverse comment by a prosecutor or trial judge upon a defendant's failure to testify at a criminal trial (*Tehan* v. *Shott*, 382 U. S. 406) and governing the admissibility of an accused's in-custody statement (*Johnson* v. *New Jersey*, 384 U. S. 719), weigh at least as heavily against retroactive application of any new exclusionary rule such as petitioner now seeks.

The purposes of any such rule would be essentially the same as the purposes of the rules developed in *Mapp* v. *Ohio*, 367 U. S. 643, *Griffin* v. *California*, 380 U. S. 609 and *Miranda* v. *Arizona*, 384 U. S. 436, in that they would be concerned primarily with the integrity of the judicial system, in a broad sense, rather than with the fairness and reliability of the trial process. An exclusionary rule may be an effective deterrent to police conduct which tends to adversely affect the administration of justice, but deterrence is a peculiarly prospective purpose. Past conduct cannot be undone. Here, moreover, the challenged conduct cannot be said to have been wrongful either at the time of the identification or at the time of the trial. Compare *Linkletter* v. *Walker*, *supra*.

Retroactive application of a new rule based on any of petitioner's claims would result in the reopening of a number of convictions obtained in reliance upon the law as it previously existed. There can be no doubt but that analogous prior decisions of this Court and the lower federal courts clearly supported the use of identification evidence such as that in the present case. See, *e.g.*, *Holt* v. *United States*, 218 U. S. 245; *Breithaupt* v. *Abram*, 352 U. S. 432. Similarly, there can be no doubt but that—at least prior to the decisions in *Massiah* v. *United States*, 377 U. S. 201 and *Escobedo* v. *Illinois*, 378 U. S. 478—evidence obtained at extra-judicial proceedings involving con-

tact with an accused was not rendered inadmissible simply because of the absence of counsel for the accused. See, *e.g.*, *Spano* v. *New York*, 360 U. S. 315.

The reopening of past convictions—with inevitably great advantages to the accused both on the collateral attack and upon retrial—would be but one of many adverse effects upon the administration of justice which would flow from retroactive application of such a rule. Because the case is so closely analogous to the *Linkletter*, *Tehan* and *Johnson* cases, retroactive application would throw the law with respect to post-conviction remedies into great confusion. One result would be a wholly unwarranted drain on legal resources at a time when these resources can be far more beneficially allocated to present responsibilities and to the pursuit of constructive developments in other areas of the criminal law. Another result would be to impose serious restraints on the progessive development of new rules by the state courts. Surely one important reason why some state courts have felt free to establish new exclusionary rules—rules which in many cases have subsequently been adopted by this Court—has been their reasonable expectation that the new rules would not affect past cases in which convictions have become final.

ARGUMENT

Petitioner's claims do not warrant relief on habeas corpus.

The petitioner in the present case concentrates his attention exclusively on what he regards as the evils of the pre-trial hospital identification. His brief completely ignores the fairness of the adjudicatory process by which he was convicted and the reliability of that judgment of conviction.

Clearly, however, the use at trial of the identification testimony violated no previously declared constitutional rights. Neither the exhibition of the body of an accused

for identification nor the manner in which an identification was made—e.g., at a "line-up", or a "show-up", or in the absence of counsel—has ever been ground for exclusion of the evidence; the circumstances under which the identification were made have, historically, gone solely to the weight to be accorded the testimony by the trier of fact. See, e.g., *Holt* v. *United States*, 218 U. S. 245, 253-54; *Copeland* v. *United States*, 343 F. 2d 287 (D. C. Cir. 1965); *Kennedy* v. *United States*, 353 F. 2d 462, 466-67 (D. C. Cir. 1966); *Caldwell* v. *United States*, 338 F. 2d 385 (8th Cir. 1964). Similarly, evidence obtained as a result of contact between law enforcement officials and an accused at which no counsel for the accused was present was not excludable on constitutional grounds at the time of petitioner's trial simply because the evidence may have been obtained after arraignment or indictment. See *Spano* v. *New York*, 360 U. S. 315. *Cf. Gilbert* v. *United States*, 366 F. 2d 923, 937-946 (9th Cir. 1966), and authorities cited therein.

In view of this state of the law, it can hardly be said that petitioner had any constitutional right, at the time of the trial, to have the identification testimony excluded from the jury's consideration. Indeed, even now it is highly questionable whether such testimony could or should be excluded on constitutional grounds. The facts of this case are quite distinguishable from those in the three recent cases of this Court upon which petitioner relies (Br., pp. 12-14)[1] and the Court below—without considering the retro-

[1] *Hamilton* v. *Alabama*, 368 U. S. 52, and *White* v. *Maryland*, 373 U. S. 59, both involved the absence of counsel at judicial proceedings. In *Hamilton*, a capital case, the defendant had had no counsel at the arraignment, a critical stage in Alabama because available defenses could be lost if not then asserted. In *White*, also a capital case, the defendant had had no counsel at a preliminary hearing at which he pleaded guilty; the plea was later introduced in evidence at trial. The present case can no longer be considered a capital case (see *supra*, p. 2, n. 2), and the hospital identification was not a part of any formal judicial proceedings, did not result in the loss of any defenses, and did not involve any self-incriminatory declarations.

(Footnote continued on following page)

activity aspects of the problem—held that such testimony was permissible. With but one exception, other courts which have considered similar claims have rejected them.[2]

We are in complete agreement with counsel for the respondent and the State District Attorneys' Association that the *en banc* Court below was correct in its rejection of petitioner's proposed exclusionary rule as uncalled for under any of the Constitutional provisions upon which he relies.

(Footnote continued from preceding page)

Massiah v. *United States*, 377 U. S. 201, was the first case to extend the right to counsel to non-judicial proceedings and involved a federal prosecution; there the defendant had been arraigned on an indictment, a lawyer-client relationship existed and was known to the government, and surreptitious means were employed by the government to circumvent this relationship and obtain incriminating statements from the defendant, who objected at trial to the introduction of the incriminatory statements. The instant case, by contrast, involves a state prosecution; here there was no existing lawyer-client relationship which was circumvented, no incriminating statements were used against the defendant, and—far from objecting at trial—the defense itself sought to use the identification testimony to its own advantage.

In addition, both *Hamilton* and *Massiah* reached the Court on direct appeal; *White* apparently would have been considered on direct appeal had the State not urged that the claim would be considered on coram nobis. The instant case, by contrast, arises on federal habeas corpus and without any explanation as to why exclusion of the now challenged evidence was not sought at trial.

[2] The exception is the United States Court of Appeals for the Fifth Circuit, which has held in a 2-1 decision that admission of testimony as to an identification made after indictment and in the absence of counsel was reversible error. *Wade* v. *United States*, 338 F. 2d 557; *cert. granted* —— U. S. ——, 17 L. Ed. 2d 53 (No. 334, Oct. Term 1966). The *Wade* case is clearly distinguishable from the present case—it arises on direct appeal and involves a federal prosecution, the conduct of federal agents, the disregard of an existing lawyer-client relationship, and the obtaining of voice communication prior to the identification. For federal and state decisions rejecting similar claims of inadmissibility of identification testimony, see *infra* page 12, n. 1; see also authorities collected in the opinion of Judge MOORE in the *en banc* Court below (R. 37, 41-46).

Because this case arises on habeas corpus, however, a retroactivity issue is necessarily present. It is with that issue that we are primarily concerned in this brief. Such an approach, we suggest, may make it unnecessary to consider the merits of petitioner's claim that the now-challenged identification testimony should have been excluded at trial. We consider the same criteria employed by the Court in other recent opinions dealing with the retroactivity of newly established exclusionary rules: the purposes of the rule; the previous state of the law; and the effect upon the administration of justice of a retroactive application of the new rule. *Linkletter* v. *Walker*, 381 U. S. 618, 629, 636; *Tehan* v. *Shott*, 382 U. S. 406, 410, 419; *Johnson* v. *New Jersey*, 384 U. S. 719, 727. We submit that a balancing of the relevant considerations makes it amply clear that any new rule which might be developed to make excludable testimony such as that now challenged in this case would have no better claim to retroactive application that did the rules at issue in the *Linkletter*, *Tehan* and *Johnson* cases, *supra*.

Purposes.

Assuming that there may be some validity to petitioner's contention that the identification procedure in the present case violated his privilege against self-incrimination, one obvious purpose of a new rule would be to protect that privilege. Clearly, however, the essential policies of this privilege—relating primarily to preservation of the integrity of a judicial system in which the guilty are not to be convicted unless the prosecution "shoulder the entire load" (*Tehan* v. *Shott*, *supra*, at 415)—would not be furthered by retroactive application of a new rule relating to the use of identification testimony. *Id.*, and see *Johnson* v. *New Jersey*, *supra*. As the Court recognized in *Schmerber* v. *California*, 384 U. S. 757, the core of the privilege is in the protection against the use of evidence of a testimonial or communicative nature which has been compelled from an accused. *Id.* at 761. When such evi-

dence has been compelled and used to obtain a conviction, the conviction is already subject to collateral attack; retroactive application of a new exclusionary rule is not necessary. *Johnson* v. *New Jersey, supra* at 730. There is no evidence whatsoever that the conviction in the present case is based upon any such communication.[1]

Other possible purposes of a new rule requiring the presence of counsel at an identification might be to increase the possibility that an accused would be exhibited "fairly" to an eyewitness and to provide an additional witness to the proceedings. The presence of counsel at interrogation provides a similar check with respect to the reliability of an accused's statements; however, this marginal function of the new *Miranda* rules (see *Miranda* v. *Arizona*, 384 U. S. 436 at 466) has been held not to require retroactive application of those rules (*Johnson* v. *New Jersey, supra*). The possibility that "better" evidence might have been obtained and introduced is present in any criminal case; in terms of past cases, the effect of a different procedure can only be speculative. It has always been open to defense counsel to explore the circumstances of an identification through cross-examination of the eyewitness and the other persons present at the identification. *Cf. Gilbert* v. *United States*, 366 F. 2d 923, 946 (9th Cir. 1966). The defense counsel in the present case went into the circumstances of the hospital identification quite thoroughly on cross-examination, and there is no suggestion that they were not before the jury.

Particularly if the right to the assistance of counsel is to be regarded as "absolute" in non-judicial proceedings as well as judicial proceedings once a prosecution has been commenced by arraignment or indictment (*cf. Massiah* v. *United States*, 377 U. S. 201), it may be argued that no contact whatsoever should be permitted between law en-

[1] Petitioner was identified as "the man" by Mrs. Behrendt, the wife of the murder victim, before he said anything aloud (1803-05). Voice identification was subsequently requested, and Stovall apparently did say a few words (*id.*), but the words were not used or referred to at the trial.

forcement officials and an accused who does not have access to counsel at the time of such contact. An exclusionary rule would, of course, be an effective deterrent to such contact. Retroactive application of such a rule would be uncalled for, however. Clearly, the deterrent purpose could not be furthered by such application; to the extent that an exclusionary rule serves as an effective deterrent to a particular kind of conduct in the criminal law field it is because law enforcement officials may, after the establishment of such a rule, be expected to act appropriately with knowledge of its sanction. Past conduct cannot be deterred. *Cf. Linkletter* v. *Walker, supra,* at 636-637. Moreover, the image of the judicial system as a steady and reliable institution would be quite adversely affected by retroactive application of such a rule. Retroactive application of a rule based on the desirability of providing counsel at extra-judicial proceedings would be completely contrary to the decision and rationale in *Johnson* v. *New Jersey, supra,* and would be inconsistent with the pre-*Massiah* decisions of the Court which had declined to establish any kind of exclusionary rule affecting post-arraignment or post-indictment contract between law enforcement officials and an accused (e.g., *Spano* v. *New York, supra*).[1]

Although petitioner relies heavily on the Sixth Amendment, the exclusionary rule he seeks is by no means analogous to the one Sixth Amendment decision, *Gideon* v. *Wainwright,* 372 U. S. 335, which has received general retroactive application. In *Gideon,* the Court "recognized a fundamental fact that a layman, no matter how intelligent, could not possibly further his claims of innocence and vio-

[1] At least two Circuit Courts have held explicitly that the absence of counsel at the time an accused made incriminating post-indictment statements to the police (which were subsequently introduced against him at trial) would not be grounds for habeas corpus relief. *Lyles* v. *Beto,* 363 F. 2d 503 (5th Cir., dec'd July 13, 1966, following remand from this Court [379 U. S. 719] for reconsideration in light of *Massiah*); *United States ex rel. Romano* v. *Fay,* 360 F. 2d 389 (2d Cir. 1966), pet. for cert. pending, No. 644 Misc., Oct. Term 1966.

lation of previously declared rights adequately." *Linkletter* v. *Walker*, *supra* at 639 n. 20. The absence of a lawyer at trial fatally infected the whole trial process, and a judgment after such a trial lacked reliability. *Id.*, and see *Tehan* v. *Shott*, *supra*, at 416; *Gideon* v. *Wainwright*, *supra*, at 344-45; *Powell* v. *Alabama*, 287 U. S. 45, 68-69. In the present case, by contrast to *Powell* and *Gideon*, the petitioner had counsel at the trial and there has been no issue raised as to the adequacy of counsel, or as to counsel's opportunity to prepare for trial, or as to the reliability of the conviction.[1]

Reliance

The Court has never previously struck down the use of identification testimony such as that introduced in the present case. Indeed, analogous prior decisions of the Court clearly support the use of such evidence. In *Holt* v. *United States*, 218 U. S. 245, the petitioner claimed that he had been forced to try on a blouse and that trial testimony of a witness to the effect that the blouse fit him should have been excluded as a violation of his Fifth Amendment rights; the Court rejected the claim in a unanimous opinion by Mr. Justice HOLMES. *Id.* at 252-253. In *Breithaupt* v. *Abram*, 352 U. S. 432, the petitioner relied on the Fifth and Fourteenth Amendments in claiming that testimony as to the alcohol content of blood which had been withdrawn from his body while he was unconscious should have been excluded at trial; this claim, too, was rejected. *Id.* at 435-440. *Breithaupt* was followed last term

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[1] Indeed, even the original panel of the Circuit Court, which sustained petitioner's Sixth Amendment claim, stated that there was "massive evidence showing Stovall to have been the killer of Dr. Behrendt" and that "the episode of the hospital identification has been overblown to a significance all out of proportion to anything it could have had at trial" (R. 32). The panel indicated that it would have accepted a "harmless error" argument if the punishment for petitioner's conviction had not been death (*id.*).

in a case in which a blood sample had been withdrawn over the accused's clear objections. *Schmerber* v. *California, supra.* The state courts and lower federal courts have also consistently upheld the use of testimony as to identifications such as that in the present case.[1]

As far as past cases are concerned, the legitimate reliance on the prior state of the law regarding identification testimony is by no means undercut by the recent decisions of the Court limiting the use of statements obtained in the absence of counsel after an indictment (*Massiah* v. *United States,* 377 U. S. 201; *McLeod* v. *Ohio,* 381 U. S. 356) or after an accusatorial stage has been reached prior to the commencement of a formal prosecution (*Escobedo* v. *Illinois,* 378 U. S. 478; *Miranda* v. *Arizona, supra*). These recent cases—all decided after petitioner's trial and after affirmance of the conviction by the New York Court

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[1] See, *e.g.,* in addition to the opinions below, *People* v. *Gilbert,* 47 Cal. Reptr. 909, 408 P. 2d 365 (1965), *cert. granted sub nom. Gilbert* v. *California,* 384 U. S. 985 (No. 223, Oct. Term 1966) (testimony of eyewitness as to identification of accused at post-indictment lineup held admissible at murder trial despite absence of already-appointed counsel at time of lineup); *Gilbert* v. *United States,* 366 F. 2d 923 (1966) (same defendant, same holding in an extensive opinion on appeal from federal bank robbery conviction); *Kennedy* v. *United States,* 353 F. 2d 462 (D. C. Cir., 1965) (testimony of robbery victims as to post-arrest identification made immediately after apprehension near scene but in absence of counsel held admissible); *Copeland* v. *United States,* 343 F. 2d 287 (D. C. Cir., 1964) (accused taken to office where robbery had taken place and there identified by victim, then taken to police station and identified by victim of different robbery, both times in absence of counsel; testimony as to both identifications held admissible); *Caldwell* v. *United States,* 338 F. 2d 385 (8th Cir., 1964) (eyewitness testimony as to identification at post-arrest "line-up", with no counsel present, held admissible); *State* v. *Fisher,* 410 P. 2d 216 (Ore., 1966) (post-arrest handwriting sample taken from accused who had not been advised of right to counsel held admissible); *Commonwealth* v. *Downer,* 159 Pa. Super. 626, 49 A. 2d 516 (1946) (testimony of eyewitness as to post-arrest identification of accused, exhibited alone, held admissible).

of Appeals—involved acceptance of theories as to a right to counsel at extra-judicial proceedings aimed at eliciting incriminating statements from an accused which the Court previously had either rejected outright (*e.g., Crooker* v. *California,* 357 U. S. 433; *Cicenia* v. *Lagay,* 357 U. S. 504 [claims of right to counsel at in-custody interrogation]) or had expressly declined to pass upon (*e.g., Spano* v. *New York,* 360 U. S. 315 [claim of right to counsel at post-indictment interrogation]).

At the time of the trial, this petitioner clearly had no federal constitutional right to the exclusion of the identification evidence either because of the manner of the identification or because it was made after arraignment. While an argument for exclusion as a matter of state law might have been urged,[1] some kind of objection or motion to exclude the testimony would have had to have been made. *People* v. *Feld,* 305 N. Y. 322, 332 (1953); *People* v. *Levine,* 297 N. Y. 144, 147-148 (1948). Petitioner's counsel, it seems clear, made a tactical choice not to seek exclusion. Such a choice would have been in keeping with his trial strategy; he sought to use the identification testimony to show that a different Negro man, who had previously worked in the same hospital as one of his victims, might have been the

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[1] Following the decision in *Spano, supra,* the New York Court of Appeals developed a State rule excluding post-indictment confessions obtained in the absence of counsel (*People* v. *DiBiasi,* 7 N. Y. 2d 544 [1961]; *People* v. *Waterman,* 9 N. Y. 2d 561 [1962]). The *DiBiasi-Waterman* rule—foreshadowed by the dissenting Court of Appeals judges in *Spano* (4 N. Y. 2d 256, 266-267) as well as by the concurring opinions in this Court (360 U. S. at 320, 324, 326)—was subsequently extended to post-arraignment confessions in two cases decided shortly before petitioner's trial commenced (*People* v. *Meyer,* 11 N. Y. 2d 162 [1962]; *People* v. *Rodriguez,* 11 N. Y. 2d 279 [1962]). The rule has not been completely inflexible, however; for example, it was not applied on appeal even in a capital case where the defendant had given testimony (forecast by his counsel in opening) which was virtually identical to his statements. *People* v. *Downs,* 8 N. Y. 2d 860 (1960), *cert. denied* 364 U. S. 867.

murderer.[1] Had defense counsel sought to exclude the identification testimony, the prosecutor might well have decided not to jeopardize an already very strong case by introducing it; at the very least the question would have been presented for appellate review.[2]

The reliance of the prosecutor and the state courts on the existing state of the law, and upon the trial tactics of the defense, is no less justified with respect to the use of the identification testimony in the present case than with respect to the use of illegally seized evidence or a statement obtained from a defendant in the absence of counsel. In some respects, it is more justified—surely it cannot be said that the evidence was obtained in violation of a clear constitutional command as was the case with the seizure of evidence in violation of Fourth Amendment, particularly following the decision in *Wolf* v. *Colorado*,

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[1] The defense focused on Walter Girodeau, a Negro who had been with petitioner earlier in the evening on which the murder was committed (3198-3209), who had worked as a male nurse in the same hospital where Mrs. Behrendt had practiced as a radiologist (2181-2182, 3237-3238), and who possessed several white jackets similar to the one taken from the Behrendt home on the night of the murder (3283-3289). It was the defense that first brought out the identification testimony (1803), and in summation, defense counsel emphasized the weaknesses in the identification. Counsel argued that Mrs. Behrendt had failed to notice obvious distinctive features of the petitioner and had in effect identified him solely on the basis of his color (4017-4019, 4026), and suggested that the much more likely suspect was Walter Girodeau (4037-4051). (Numbers in parentheses refer to folios in the printed record on the State appeal.)

[2] We do not suggest that the failure to object "waived" a constitutional right, since the claimed right to exclusion certainly was not in existence at that time. Of course, to the extent that the State might be held chargeable with knowledge of the now claimed right, the petitioner would be similarly chargeable. The case is illustrative of many in which a defendant seeks to gain release on collateral attack through an attack on the admission of evidence which he sought to use to his own advantage at trial. See, *e.g.*, *United States ex rel. Machado* v. *Wilkins*, 351 F. 2d 892 (2d Cir., 1965); *United States ex rel. Pizzaro* v. *Fay*, 353 F. 2d 726 (2d Cir., 1965). *Cf. Henry* v. *Mississippi*, 379 U. S. 443.

338 U. S. 24. Nor was its use at trial proscribed under any of the constitutional provisions now relied on by the petitioner. See *Spano* v. *New York, supra; Holt* v. *United States, supra; Breithaupt* v. *Abram, supra.*

Effects upon the administration of justice

While a substantial number of previous federal and state convictions would undoubtedly be affected by a decision sustaining this petitioner's claim to habeas corpus relief,[1] the release of convicted prisoners would be but one of many disruptive effects which would be caused by such a decision.

Application of a new exclusionary rule in this case would be quite inconsistent with previous cases in which the Court has upheld claims to habeas relief. The kinds of claims which have historically been recognized as warranting post-conviction relief are those which go to the fair-

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[1] The number of cases affected would, of course, depend on the scope of the new rule, but it would almost certainly be substantial. Judge Nathan Sobel has recently estimated that eyewitness problems occur five times as often as confession problems and 3½ times as often as search and seizure problems (New York Times, December 8, 1966, p. 53, col. 1). If a new rule were not limited to identifications but affected any evidence obtained after arraignment or indictment as a result of police contact with a defendant not then represented by counsel (*cf. McLeod* v. *Ohio,* 381 U. S. 356), a great number of cases could be affected, particularly those in which a defendant had jumped bail or been incarcerated in another jurisdiction prior to trial. Application of any such rule on collateral attack would, of course, afford significant advantages to a convicted prisoner who sought post-conviction relief on the basis of the new rule. Both on the collateral attack and upon retrial of the case, the passage of time—with the consequent dimming of memories, death or departure of witnesses, loss of relevant records, and possible intervening development of other previously unforeseen exclusionary rules—would inevitably work to the accused's advantage. See, e.g., *Linkletter* v. *Walker, supra,* at 637-38; *Tehan* v. *Shott, supra,* at 418-19; *Johnson* v. *New Jersey, supra,* at 731-32; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 478 (1963).

ness of the trial process itself, and which raise genuine doubt as to the reliability of the adjudication of guilt.[1] The absence of counsel at trial (*Gideon* v. *Wainwright*, 372 U. S. 335); the denial of opportunity to appeal (*Griffin* v. *Illinois*, 351 U. S. 12; *Eskridge* v. *Washington*, 357 U. S. 214; *Douglas* v. *California*, 372 U. S. 356); the use of an involuntary confession (*Reck* v. *Pate*, 367 U. S. 443; *Fay* v. *Noia*, 372 U. S. 391; *Townsend* v. *Sain*, 372 U. S. 293; *Davis* v. *North Carolina*, 384 U. S. 737); the use of an unfair and unreliable procedure for testing voluntariness (*Jackson* v. *Denno*, 378 U. S. 368); the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103); and trial under conditions of mob domination or inflammatory publicity (*Moore* v. *Dempsey*, 261 U. S. 86; *Irvin* v. *Dowd*, 359 U. S. 394; *Sheppard* v. *Maxwell*, 384 U. S. 333), fall into this category. These are the kinds of cases in which it can truly be said continued imprisonment is intolerable (*cf. Fay* v. *Noia*, *supra*, at 401-02, 442); where a defendant has really been afforded "no process of law."[2] These are the cases in which the judgment was, in effect, void *ab initio*, and thus subject to attack on federal habeas corpus just as any void judgment is always open to collateral attack. See *Fay* v. *Noia*, *supra*, at 423.

The instant case, like others in which claims to post-conviction relief have been based upon newly developed exclusionary rules, stands in striking contrast to those in which claims to post-conviction relief have been upheld by the Court. In its relevant aspects, this case is indistinguishable from *Johnson*, *Tehan* and *Linkletter*, *supra*. As in those cases, there is no doubt but that the petitioner was represented by counsel who had had adequate opportunity to pre-

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[1] See Brief for Respondent in *Angelet* v. *Fay*, No. 578, Oct. Term 1964, pp. 18-20, 32-36; *cf.* Mishkin, *The High Court, The Great Writ*, and the *Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965); *Linkletter* v. *Walker*, *supra*, at 636, n. 20.

[2] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-60 (1963).

pare for trial, nor is there any doubt as to the fairness of the trial process itself or as to the reliability of the adjudication of guilt. Surely this is the essence of due process.

Retroactive application of a new exclusionary rule affecting the use of identification evidence, or affecting the use of evidence obtained as a result of post-arraignment or post-indictment contact with an accused, would surely tend to inhibit the progressive development of other new rules in the criminal law field. The *Massiah*, *Escobedo* and *Miranda* decisions of this Court were founded substantially on the prior development of similar rules by the state courts, most notably the New York Court of Appeals and the California Supreme Court.[1] Yet it seems clear that one reason why these and other state courts have exercised their powers broadly in establishing new exclusionary rules is because of their expectation that the new rules would affect relatively few past cases.[2]

Significantly, the progressive New York and California rules, as well as the rules established in *Massiah*, *Escobedo* and *Miranda*, were all fashioned on direct appeal in cases where appropriate and timely objections were made to the introduction of the evidence in question. If collateral attack were to be made available for claims such as that of this petitioner—whose counsel made no effort to exclude the now-challenged evidence and in fact sought to gain some ad-

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[1] The *Massiah* decision noted some 10 New York decisions, most notably *People* v. *Waterman*, 9 N. Y. 2d 561 (1961); *People* v. *Rodriguez*, 11 N. Y. 2d 279 (1962); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); and *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). The *Escobedo* opinion relied on *People* v. *Donovan*, 13 N. Y. 2d 148 (1963). The *Miranda* opinion relied on the California decision in *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965).

[2] Both the New York and California courts have declined to apply their new rules retroactively to cases no longer in the direct appellate process. See, e.g., *People* v. *Howard*, 12 N. Y. 2d 65 (1963), cert. denied 374 U. S. 840 (1963); *People* v. *Dash*, 16 N. Y. 2d 493 (1965); *In re Lopez*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965).

vantage from its use[1]—it is to be expected that concepts of trial strategy would be adjusted accordingly. Surely the incentive of defense counsel to challenge an existing rule of law in a developing area would be lessened—a different course could be pursued at trial and, as here, a constitutional challenge could later be made on collateral attack. Both the lessened likelihood of challenge to existing rules and the spectre of further retroactive effects could be expected to inhibit state courts—and perhaps also the lower federal courts, which would have to cope with post-conviction applications from federal prisoners as well as state prisoners—from engaging in future constructive decision-making.

The concept of collateral relief which is implicit in petitioner's approach to the present case is an entirely new and unnecessary one. It is a concept which regards federal habeas corpus as indistinguishable from the direct appellate process, which ignores the fairness of the trial process and the reliability of the judgment of guilt, and which is directly contrary to the approach of the Court to similar problems in the *Linkletter*, *Tehan*, and *Johnson* cases.

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[1] The original panel in the Court below stated that it could see "no real excuse" for the failure to seek an exclusionary ruling prior to the introduction of the identification testimony (R. 29), but expressed "doubt that the Supreme Court would permit so demanding a standard in a capital case" (*id.*).

CONCLUSION

Assuming *arguendo* that the Court might establish a new rule limiting the admissibility of identification testimony obtained under circumstances such as existed in the present case, such an exclusionary rule should not be applied retroactively. The decision of the *en banc* Court below, affirming the denial by the District Court of petitioner's application for a writ of habeas corpus, should be affirmed.

Dated: New York, New York, December 24, 1966.

Respectfully submitted,

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